

STATE OF MICHIGAN
COURT OF APPEALS

GERALD WHITING,

Plaintiff-Appellant,

v

DEPARTMENT OF MANAGEMENT AND
BUDGET,

Defendant-Appellee.

UNPUBLISHED

March 28, 2000

No. 217161

Ingham Circuit Court

LC No. 97-086554-CZ

Before: Whitbeck, P.J., and Hoekstra and Owens, JJ.

PER CURIAM.

In this age and reverse race discrimination case, plaintiff appeals as of right from an order granting summary disposition under MCR 2.116(C)(10) in favor of defendant. We affirm.

This case arises out of defendant's decision not to promote plaintiff, a white male who was in his mid-forties, to defendant's director of operations in the property management division and director of the construction division positions. On appeal, plaintiff contends that the trial court erred by granting defendant's motion for summary disposition on plaintiff's age and reverse race discrimination claims. This Court reviews the trial court's decision to grant or deny summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We must consider the substantively admissible evidence proffered by the party opposing the motion to determine whether a genuine issue of material fact exists or whether the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

Section 202 of Michigan's Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*, prohibits an employer from discriminating "against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . race . . . [or] age . . ." MCL 37.2202(1)(a); MSA 3.548(202)(1)(a); *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 358; 597 NW2d 250 (1999). If a plaintiff establishes a prima facie case of discrimination, then under *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973), the burden shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse decision. *Allen v Comprehensive Health Services*, 222 Mich App 426, 430; 564 NW2d 914

(1997). If the defendant does such, the burden then shifts back to the plaintiff to show that proffered reason is a “pretext” for discrimination. *Id.* “Disproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action.” *Hall v McRea Corp*, 238 Mich App 361, 371; 605 NW2d 354 (1999) (emphasis deleted), quoting *Lytle v Malady (On Rehearing)*, 458 Mich 153, 175; 579 NW2d 906 (1998). However, if an age or reverse race discrimination plaintiff has “direct evidence” that, if believed, would show that discrimination was at least a factor in an adverse employment action, the *McDonnell Douglas* burden-shifting framework is not applicable. See *Wilcoxon, supra* at 360; *Harrison v Olde Financial Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

Plaintiff argues that defendant operated on racial preferences in making the promotional decisions at issue, that direct and circumstantial evidence support this claim and that defendant’s stated reasons for its decisions were pretextual. Tied into plaintiff’s analysis is his claim that age discrimination was also a motivating factor in defendant’s promotion decisions. Assuming under the *McDonnell Douglas* burden-shifting framework that plaintiff presented a prima facie case of reverse race discrimination¹ and of age discrimination,² defendant proffered legitimate nondiscriminatory reasons for its promotion of the younger individuals as well as a younger black male, including superior education, management skills and decision-making abilities and higher evaluation scores. Thus, plaintiff must show that defendant’s reasons were pretextual. Plaintiff fails here.

Plaintiff points to a number of circumstances to show that defendant’s proffered reasons for its promotion decisions were pretextual. Specifically, plaintiff claims that he was more qualified than the promoted candidates. Plaintiff also asserts that defendant lowered the necessary qualifications for a job, modified the interview questions, and selected outside interviewers, including a black person, to accommodate the entire process to reach the desired outcome of promotion of the black candidate. Based on these assertions, plaintiff concludes that “the overall selection process was a farce with an predetermined outcome.”

Ultimately, any changes in the job qualifications and how defendant composes a group of interviewers is within defendant’s discretion. It is within the province of an employer to make determinations as to what best suits the lawful needs and goals of its ongoing operations, including how to conduct job interviews. Plaintiff has failed to demonstrate that the process was designed for a discriminatory purpose rather than a legitimate business purpose. Nor has plaintiff shown that the procedure made it predetermined that a black candidate was the only person who could have received the promotion. Further, we decline, as did the trial court, to infer that a black interviewer would be prejudiced toward white applicants or would not be capable of exercising fair judgment merely because of his own race. In sum, plaintiff’s suspicions and speculation are insufficient to show that defendant’s reasons for promoting a black person were pretextual. Because the evidence proffered by plaintiff fails to disprove that defendant’s articulated reasons for promoting younger individuals and a black individual instead of plaintiff were pretextual and fails to raise a triable issue that discriminatory animus was a motivating factor underlying the promotion decisions, summary disposition was appropriate.

Plaintiff also claims that he presented direct evidence of reverse race discrimination. According to plaintiff, this direct evidence includes a statement by defendant's employee that defendant wanted to promote only blacks, the selection of a black interview panelist because a black applicant was to be interviewed, defendant's efforts to promote the allegedly unqualified black candidate, and evidence that affirmative action goals, including bonus incentives, played a role in the promotion process. Plaintiff's argument is without merit because this evidence is not "direct evidence" that, if believed, would indicate that reverse race discrimination was at least a factor when defendant failed to promote plaintiff. *Wilcoxon, supra; Harrison, supra*. Nor does this evidence support plaintiff's claim that defendant's reasons for its promotion decisions were pretext for discrimination.

As pointed out by the trial court, the alleged statement about promoting only blacks was made approximately ten years before the promotion decisions in question by an employee who was not on the interviewing panel and who had in fact retired before the black individual received the construction division director position. Plaintiff presents no proof that this employee's perception of defendant's policy was known or held by any of the interviewing panelists. We already addressed plaintiff's claims about defendant using a black interview panelist and defendant's determinations of necessary qualifications and its implementation of a modified interviewing process and found them to be without merit. Further, the only evidence that would approach a discriminatory intent on behalf of defendant are its affirmative action goals and bonus incentives for its employees who comply with those goals. However, members of the interview panel who recommended hiring the black employee averred that they selected him because he was the superior candidate, not because of affirmative action, and plaintiff has failed to present evidence that would indicate otherwise. Further, affirmative action is but one of six categories on which the possibility of receiving a bonus rests. Even with this additional evidence, plaintiff has failed to show defendant's reasons for promoting the black person were pretext for reverse race discrimination.

Plaintiff also argues that he can prove age discrimination by showing that defendant's actions amounted to a pattern and practice of age-related discriminatory promotions. To support this claim, plaintiff relies on the fact that every time he applied for a position, a younger man, who was allegedly less qualified than he was, got the positions. Standing alone, the fact that younger persons were promoted, while plaintiff was not promoted, is insufficient to show a pattern and practice of age discrimination. Nothing in the evidence presented by plaintiff demonstrates that defendant's decisions were motivated by age-related discrimination or that defendant engaged in a pattern and practice of age-related discriminatory acts.

Plaintiff's remaining claims deal with the trial court's alleged "findings of fact." Plaintiff contends that when the trial court addressed the merits of his reverse race and age discrimination claims, it erroneously made several "findings of fact" and also omitted some facts that lent merit to both of these claims. We disagree. There is no evidence that the trial court actually made "findings of fact" that certain material events did or did not happen when it addressed the merits of plaintiff's claims. Even if the trial court actually made "findings of fact," there was no factual development that could justify allowing plaintiff's claims to proceed to trial. *Jubenville v West*

End Cartage, Inc., 163 Mich App 199, 203; 413 NW2d 705 (1987). In addition, plaintiff failed to provide any evidence that the trial court omitted some facts that may have lent merit to his claims.

Affirmed.

/s/ William C. Whitbeck

/s/ Joel P. Hoekstra

/s/ Donald S. Owens

¹ Under the *McDonnell Douglas* burden-shifting framework, a plaintiff may establish a prima facie case of reverse race discrimination by showing (i) background circumstances supporting a suspicion that the defendant is that unusual employer who discriminates against the majority; (ii) that the plaintiff applied and was qualified for an available promotion; (iii) that plaintiff was not promoted, despite his qualifications, and (iv) that a minority employee of similar qualifications was promoted. See *Allen, supra* at 433.

² To establish a prima facie case of age discrimination, plaintiff must prove that (1) he was a member of the protected class; (2) he suffered an adverse employment action; (3) he was qualified for the position; but (4) he was not promoted under circumstances that give rise to an inference of unlawful discrimination. See *Lytle, supra* at 172-173; *Hall, supra* at 370.